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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re D.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.T., Defendant and Appellant.	A144654 (Contra Costa County Super. Ct. No. J14-01294)

Appellant D.T. appeals from the juvenile court's dispositional order, challenging two of his probation conditions and arguing the court failed to determine the maximum term of confinement and precommitment credits. We agree in part and remand.

BACKGROUND

On January 5, 2015, appellant pled no contest to the following charges alleged in an amended Welfare and Institutions Code section 602[1] petition: possession of a concealed firearm by a minor (Pen. Code, § 29610) and misdemeanor resisting a police officer (Pen. Code, § 148, subd. (a)(1)).[2] According to the probation report, the charges

[1] All undesignated section references are to the Welfare and Institutions Code.

[2] Additional charged were dismissed.

arose from a December 2014 incident when police officers observed appellant and several other juveniles throwing dice and exchanging money in a parking lot near a high school. When an officer approached the group, appellant ran away and disregarded an order to stop. After appellant was apprehended, a revolver loaded with blank rounds fell from his waistband.

On January 20, 2015, the juvenile court adjudged appellant a ward of the court, ordered him committed to the Orin Allen Youth Rehabilitation Facility for nine months, and imposed terms and conditions of probation. The probation conditions imposed by the court included that appellant not possess any deadly or dangerous weapons and that he submit to searches of his electronic devices.

DISCUSSION

I. *Dangerous or Deadly Weapons Condition*

Appellant first challenges the condition that he not use or possess any "deadly or dangerous weapons." He contends the condition is unconstitutionally vague because it fails to include an express requirement that he knowingly possess the prohibited items. The People contend an express knowledge requirement is not necessary.

"Under Welfare and Institutions Code section 730, subdivision (b), a juvenile court may impose 'any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' In spite of the juvenile court's broad discretion, '[a] probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated," if it is to withstand a challenge on the ground of vagueness. [Citation.] . . . A defendant may contend for the first time on appeal that a probation condition is unconstitutionally vague . . . when the challenge presents a pure question of law that the appellate court can resolve without reference to the sentencing record.' " (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 357.)

In re Kevin F. concluded that, "given the breadth of what might be considered a 'weapon,' . . . a requirement of actual knowledge of the character of the weapon is appropriate to avoid criminalizing innocent conduct." (*Id.* at p. 365.) The court

explained, "the difficulty of defining with perfect clarity every potential item that might be considered a weapon illustrates why more warning is necessary. To provide adequate protection against unwitting violations, the probationer must engage in the proscribed conduct *knowingly* (i.e., with actual intent and understanding that he possesses something constituting a weapon). Particularly since there is a conditional liberty interest at stake, we think the addition of an express knowledge requirement making the scope of the prohibited conduct clear in advance to all who may be involved—to probationers, to law enforcement officers, to probation departments, and to juvenile courts—best comports with due process." (*Ibid*.)

The People argue the requested modifications are unnecessary because appellant can only violate a condition of his probation if he does so willfully. The primary case relied on by the People, *People v. Gaines*, has subsequently been depublished following the Supreme Court's grant of review. (*People v. Gaines* (2015) 242 Cal.App.4th 1035, review granted Feb. 17, 2016, S231723.) This issue is pending before our Supreme Court. (See *People v. Hall*, review granted Sept. 9, 2015, S227193.) While we await its resolution, we will continue to include an explicit, if perhaps unnecessary, knowledge requirement. Accordingly, we will direct the condition be modified to provide appellant may not *knowingly* use or possess any deadly or dangerous weapons.[3]

II. *Electronic Search Condition*

Appellant next challenges the condition that he submit for searching "any cell phone or other electronic device, including the passwords therefor . . . ." Appellant argues the condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and is constitutionally overbroad.

A. *Reasonableness Under Lent*

Appellant did not object to the condition below. Unlike facial constitutional challenges, a challenge to a condition's reasonableness is forfeited if not raised below.

[3] Appellant requests the modification be that he may not *knowingly* use or possess any item *he knows* is a dangerous or deadly weapon. We reject the second modification as redundant.

(*In re Sheena K.* (2007) 40 Cal.4th 875, 882.) He contends his trial counsel was ineffective in failing to object. We disagree.[4]

" 'A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and even to impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile.' " (*In re J.B.* (2015) 242 Cal.App.4th 749, 753–754.) " 'The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults.' " (*Id.* at p. 754.)

Under *Lent*, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " (*Lent, supra*, 15 Cal.3d at p. 486.) "In order to invalidate a condition of probation under the *Lent* test, all three factors must be found to be present. [Citations.] This three-part test applies equally to juvenile probation conditions." (*In re J.B., supra*, 242 Cal.App.4th at p. 754.)

The parties agree the electronics search condition meets the first two prongs of the *Lent* test, but dispute whether it satisfies the third. We note that our Supreme Court has granted review in a case presenting this precise issue: whether an electronics search condition was justified on the sole ground that it is reasonably related to future criminality. (*In re Ricardo P.*, review granted Feb. 17, 2016, S230923).)

The issue has divided Courts of Appeal. (See *In re A.S.* (2016) 245 Cal.App.4th 758, 761, ptn. for review pending; accord In re P.O. (2016) 246 Cal.App.4th 288, 291.) For example, *In re A.S.* concluded the condition was reasonably related to future criminality. (*Id.* at p. 772 .) *In re A.S.* relied in part on *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*) in which the Supreme Court upheld a condition requiring the defendant to notify his probation officer of any pets on the ground that "[p]robation

[4] Because we consider the substance of appellant's reasonableness challenge in the context of his ineffective assistance claim, we need not address his request that we excuse the forfeiture.

officers are charged with supervising probationers' compliance with the specific terms of their probation to ensure the safety of the public and the rehabilitation of probationers. Pets residing with probationers have the potential to distract, impede, and endanger probation officers in the exercise of their supervisory duties. By mandating that probation officers be kept informed of the presence of such pets, this notification condition facilitates the effective supervision of probationers and, as such, is reasonably related to deterring future criminality." (*Id.* at p. 378.) *In re A.S.* concluded that, like the condition in *Olguin*, the electronic search condition facilitates supervision of the minor. (*In re A.S.*, *supra*, 245 Cal.App.4th at p. 762.)[5] Three Court of Appeal cases relied on by the People (including one from this Division), in which the Supreme Court subsequently granted review, also upheld electronic search conditions as reasonably related to future criminality. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231425; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240.)

In contrast, *In re J.B.* struck such a condition as unreasonable. (*In re J.B.*, *supra*, 242 Cal.App.4th at p. 752.) *In re J.B.* noted that *Olguin* emphasized the reasonableness of the condition and concluded "[t]he fact that a search condition would facilitate general oversight of the individual's activities is insufficient to justify an open-ended search condition permitting review of all information contained or accessible on the minor's smart phone or other electronic devices." (*In re J.B.*, *supra*, at pp. 757-758; accord, *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849.)

While awaiting guidance from the Supreme Court on the matter, we agree with the reasoning of *In re A.S.* and find the electronic search condition reasonably related to

[5] In upholding the condition, *In re A.S.* relied on evidence indicating the minor was "very troubled" and the juvenile court's finding there was a "need for close supervision of [the minor's] daily activities for there to be any hope of her success on probation." (*In re A.S.*, *supra*, 245 Cal.App.4th at pp. 771–772.) There is no similar evidence or finding in appellant's case.

appellant's future criminality. The condition will help probation officers ensure appellant does not possess weapons; in addition, as the People note, it will help probation monitor whether appellant is complying with other conditions, including a condition that he stay away from certain minors also present at the incident. Accordingly, appellant's trial counsel was not ineffective in failing to object to the condition below.

B. *Constitutional Overbreadth*

Appellant next argues the electronic search condition is not narrowly tailored. Appellant contends the *entire* condition should be stricken as insufficiently tailored, arguing his other probation conditions are sufficient. We disagree that the other conditions are equally effective means to monitor appellant's compliance with his probation.

The People concede, however, the condition should be limited to text messages, voicemail messages, call logs, photographs, e-mail, and social media accounts. We agree with the concession. These items are reasonably likely to help determine whether appellant is complying with his probation, whereas other data that may be present on his electronic devices—such as banking information and medical records—are not. We will order the provision modified accordingly.

III. *Maximum Period of Confinement and Precommitment Credits*

Appellant argues the juvenile court failed to specify his maximum term of confinement and failed to calculate his custody credits. We agree.

California Rules of Court rule 5.795(b)[6] provides that if a minor "is declared a ward under section 602 and ordered removed from the physical custody of a parent or guardian, *the court must specify and note in the minutes the maximum period of confinement* under section 726." (Italics added.) In addition, "a minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. [Citations.] It is the juvenile court's duty to calculate the

[6] All undesignated rule references are to the California Rules of Court.

number of days earned, and the court may not delegate that duty." (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

The People first argue the juvenile court orally indicated the maximum period of confinement at the jurisdiction hearing. An oral pronouncement made before appellant was adjudged a ward and removed from his parent's custody does not satisfy rule 5.795(b). The People next argue the probation report set forth appellant's total maximum period of confinement and the maximum period of confinement after his precommitment custody credits had been applied. But it is the juvenile court—not probation—that must determine these periods. (Rule 5.795(b); *In re Emilio C.*, *supra*, 116 Cal.App.4th at p. 1067.)

The People finally argue that appellant failed to include the juvenile court's "commitment order" in the record, which the People claim "doubtless" contains these required elements. The People refer to Judicial Council form JV-732, a form for commitment of a minor to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities. Appellant was not committed to the Division of Juvenile Facilities so there is no reason to think this form is part of the trial court record. Moreover, the normal record in a juvenile appeal includes "[t]he jurisdictional and dispositional findings and orders" (rule 8.407(a)(5)) and the record includes a minute order from appellant's dispositional hearing. We decline to presume the trial court record contains an order missing from the record on appeal, or to further presume that missing order includes the maximum term of confinement and precommitment credits. Instead, we will remand.

DISPOSITION

The matter is remanded for the juvenile court to (1) modify the weapons condition to provide appellant is not to "knowingly use or possess any deadly or dangerous weapons"; (2) modify the electronic search condition to provide appellant submit "any cell phone or other electronic device, including the passwords therefor, to a search of any text messages, voicemail messages, call logs, photographs, e-mail accounts and social

media accounts"; and (3) specify the maximum term of confinement and determine precommitment custody credits. The juvenile court's orders are otherwise affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.